MOHD RAFIZI RAMLI & ANOR v. PP & OTHER APPEALS

HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE ABDULLAH J
[CRIMINAL APPLICATIONS NO: 44-138-12-2013,
44-139-12-2013 & 44-32-03-2014]
23 MAY 2016

CRIMINAL LAW: *Offences – Illegal assembly – Notification of assembly – Failure to give police ten days' notice – Applicants charged under s. 15(3) of Peaceful Assembly Act 2012 ('PAA') – Whether requirement to give notice reasonable – Whether requirement under s. 9(1) of PAA to give notice prior to assembly a 'restriction' within art. 10(2)(b) of Federal Constitution – Whether non-compliance to give notice warranted criminal sanction – Whether ss. 4(2)(b), 4(3), 9(1), 9(5), 10(c), 15(3) of PAA constitutional and valid – Whether court bound by decision in Nik Nazmi v. PP or PP v. Yuneswaran*

As part of the Blackout 505 rallies series, a gathering was held to protest against the outcome of the 13th General Elections. According to the applicants, the OCPD Dang Wangi ('OCPD') was informed about the assembly *via* a letter and a notification, as required under s. 9(1) of the Peaceful Assembly Act 2012. However, the applicants were charged for failing to comply with the conditions set by the OCPD, namely to obtain the consent of the owner of the venue for the assembly, an offence punishable under s. 15(3) of the PAA read together with s. 34 of the Penal Code ('the main charge'). There was also an alternative charge under s. 10(c) of the PAA to include the consent of the venue's owner/occupier, together with the notification dated 12 June 2013 to the OCPD as required under s. 10(c) of the PAA which amounted to a failure to give the ten days' notification before the assembly, thus breaching s. 9(1) and (5) of the PAA ('the alternative charge'). In these applications, the applicants sought an order (i) that ss. 4(2)(b), 4(3), 9(1), 9(5), 10(c), 15(3) of the PAA are null and void; and (ii) the main and alternative charges be suspended and/or set aside and struck out. The court was faced with two conflicting decisions of the Court of Appeal. In *Nik Nazmi v. PP*, s. 9(5) of the PAA was declared as null and void. However, in *PP v. Yuneswaran*, s. 9(5) of the PAA was declared constitutional, valid and enforceable.

Held (dismissing applications):

(1) The court chose to follow the later decision of the Court of Appeal in *PP v. Yuneswaran*. The requirement under s. 9(1) of the PAA to give notice prior to the exercise of the right to assemble peacefully is not a 'restriction' within the meaning of art. 10(2)(b) of the Federal Constitution ('Constitution') and the imposition of criminal sanctions under s. 9(5) of the PAA for breach of requirement to give notice is not *ultra vires* art. 10(2)(b) of the Constitution. There was no issue as to the

constitutionality of ss. 4(2)(b), 4(3), 9(1), 9(5), 10(c), 15(3) of the PAA. There is nothing in art. 10(2) that could be construed as prohibiting the imposition of criminal sanctions for non-compliance with the ten days' notice. The prohibition against assembling at the list of prohibited places listed in the First Schedule is but a form of restriction on the right to peaceful assembly. (paras 33, 38 & 39)

Case(s) referred to:
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Nik Nazmi Nik Ahmad v. PP [2014] 4 CLJ 944 CA ***(refd)***
PP v. Azmi Sharom [2015] 8 CLJ 921 FC ***(refd)***
PP v. Yuneswaran Ramaraj [2015] 9 CLJ 873 CA ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors [2005] 3 CLJ 539 CA ***(refd)***
Young v. Bristol Aeroplane Co Ltd [1944] KB 718; [1946] AC 163 ***(refd)***

Legislation referred to:
Federal Constitution, arts. 10(1)(b), (2)(b), (c), 74
Peaceful Assembly Act 2012, ss. 3, 4(2)(b), (3), 9(1), (5), 10(c), 15(3), First Schedule
Penal Code, s. 34

(Criminal Application No: 44-138-12-2013)
For the applicants - N Surendran & Latheefa Koya; M/s Daim & Gamany
For the respondent - Wan Shaharuddin Wan Ladin, Nurul Huda Aini Mohd Nor & Ahmad Ishrakh Saad; DPPs, AG's Chambers

(Criminal Application No: 44-139-12-2013)
For the applicants - Eric Paulsen; M/s Daim & Gamany
For the respondent - Wan Shaharuddin Wan Ladin, Nurul Huda Aini Mohd Nor & Ahmad Ishrakh Saad; DPPs, AG's Chambers

(Criminal Application No: 44-32-03-2014)
For the applicant - Jayaseelan A; M/s Jayaseelan & Co
For the respondent - Wan Shaharuddin Wan Ladin, Nurul Huda Aini Mohd Nor & Ahmad Ishrakh Saad; DPPs, AG's Chambers

[Editor's note: Appeal from Sessions Court, Kuala Lumpur; Summons Case No: 62-686-07-2013, 62-690-07-2013, 62-691-07-2013, 62-692-07-2013, 62-693-07-2013 & MS2-62-710-08-2013.]

Reported by Najib Tamby

JUDGMENT

Amelia Tee Abdullah J:

[1] The three applications involved common issues as to the constitutionality of various provisions of the Peaceful Assembly Act 2012, namely ss. 4(2)(b), 4(3), 9(1), 9(5) , 10(c) and 15(3). The applications were heard together as they involved provisions of the same Act.

Criminal Application No. 44-138-12-2013

[2] The applicants in this case are Mohd Rafizi bin Ramli and Mohd Adib bin Ishar. The applicants sought an order that ss. 9(1), 9(5), 10(c) and 15(3) of the Peaceful Assembly Act 2012 ("the PAA") are null and void and that their main charge under s. 15(3) of the PAA and alternative charge for non-compliance of s. 10(c), resulting in breach of s. 9(1) punishable under s. 9(5) of the PAA in Kuala Lumpur Sessions Court Criminal Case No. 62-686-07-2013 be suspended and/or set aside and struck out.

[3] The main charge against the applicants was that in organising the assembly, the applicants had failed to comply with conditions set by the OCPD Dang Wangi, namely to obtain the consent of the owner of the venue, namely Kuala Lumpur City Council (DBKL), for the assembly, an offence punishable under s. 15(3) of the PAA read together with s. 34 of the Penal Code. There is an alternative charge under s. 10(c) of the PAA for failing to include the consent of the venue's owner/occupier, namely Kuala Lumpur City Council (DBKL) together with the notification dated 12 June 2013 to the OCPD as required under s. 10(c) of the PAA which amounted to a failure to give the ten days' notification before the assembly, thus breaching s. 9(1) and 9(5) of the PAA.

[4] Briefly, a gathering was held at Padang Merbok on 22 June 2013 as part of a serious of Blackout 505 rallies held to protest the outcome of the 13th General Elections. The applicants, Mohd Rafizi bin Ramli, is Parti Keadilan Rakyat's Strategy Director whilst Mohd Adib bin Ishar is a staff of Pakatan Rakyat's Secretariat. The applicants contend that it was a peaceful gathering.

[5] According to the applicants, on 6 June 2013, Mohd Rafizi bin Ramli ("Rafizi") had informed the OCPD Dang Wangi *via* letter about an assembly to be held at Padang Merbok, Kuala Lumpur together with a notification as required under s. 9(1) of the PAA. On 7 June 2013, Rafizi had written to Encik Rozduan bin Abdul Hali, the Recreation Manager of Padang Merbok, to rent a field for a peaceful assembly scheduled on 22 June 2013.

[6] On 12 June 2013, Rafizi had informed the OCPD of a change in the date and time of the peaceful assembly to 22 June 2013.

[7] According to the applicants, Mohd Adib bin Ishar's ("Mohd Adib") role was only as an intermediary between both parties where he had exercised a purely administrative function in the organisation of the assembly.

Criminal Application No. 44-139-12-2013

[8] The applicants in this application are Muhammad Safwan bin Anang, Ehsan Bukharee bin Badarul Hisham, Adam Adli bin Abdul Halim and Muhamed Bukhary bin Mohamed Sofian. They seek an order that s. 4(2)(b)

and 4(3) of the PAA are null and void, that their charges under s. 4(2)(b) and punishable under s. 4(3) of the PAA in Kuala Lumpur Sessions Court Criminal Cases No. 62-690-07-2013, 62-691-07-2013, 62-692-07-2013, 62-693-07-2013 be suspended and/or set aside and struck out and that they be acquitted and released.

[9] The charges against the applicants were for participating in an assembly held at a prohibited place, namely at the compound of the Masjid Ar-Rahman, Universiti Malaya, Jalan Pantai Baharu, Kuala Lumpur, an offence under s. 4(2)(b) of the PAA 2012 and punishable under s. 4(3). 'Places of worship' has been listed as one of the prohibited places in the First Schedule of the PAA.

[10] It is the applicants' case that according to reports received by Parti Keadilan Rakyat ("PKR"), Democratic Action Party ("DAP") and Parti Islam Se-Malaysia ("PAS") as well as Bersih's People Tribunal, there was widespread election fraud and wrongdoings committed throughout the country by certain quarters, and allegedly aided by the Elections Commission. The fraud and wrongdoings were so widespread and significant that it decided the outcome of the General Elections. A significant portion of the electorate was angry and unhappy with the results and viewed Barisan Nasional's victory as illegitimate.

[11] In support of the aspirations of the people and to express their dissatisfaction and anger, Pakatan Rakyat had organised a series of urgent assemblies to inform the rakyat of what they intend to do to address these alleged fraud and wrongdoings.

[12] The applicants were student activists and activists for Bersih and they contend that they were exercising their right to freedom of speech and assembly and to express their feelings and spread awareness regarding the results of the 13th General Elections.

Criminal Application No. 44-32-03-2014

[13] The applicant in this case is Khairul Anuar bin Ahmad Zainudin. His application is the same as that of the applicants in Criminal Application No. 44-139-12-2013, that is, for an order that s. 4(2)(b) and 4(3) of the PAA are null and void and that the charge against him under s. 4(2)(b) and punishable under s. 4(3) of the PAA in Kuala Lumpur Sessions Court Summons Case No. 62-710-08-2013 be suspended and/or set aside and struck out and that he be acquitted and released.

[14] The charge against this applicant is also for participating in an assembly which was held at a prohibited place, namely at the compound of the Masjid Ar-Rahman, Universiti Malaya, Jalan Pantai Baharu, an offence under s. 4(2)(b) of the PAA 2012 and punishable under s. 4(3). Under the First Schedule of the PAA 2012, places of worship are listed among the

"prohibited places" where it is an offence to organise or participate in an assembly held at a prohibited place and within fifty metres from the limit of the prohibited place.

The Issues

[15] Basically the challenges made by the various applicants are with regard to the question of whether ss. 4(2)(b), 4(3), 9(1), 9(5), 10(c) and 15(3) of the PAA 2012 are null and void and whether Kuala Lumpur Sessions Court Criminal Cases No. 62-686-07-2013, No. 62-690-07-2013, 62-691-07-2013, 62-692-07-2013, 62-693-07-2013 and No. 62-710-08-2013 should be suspended, set aside or struck out and the applicants be acquitted and discharged.

[16] In summary, learned counsel for the applicants in Criminal Application No. 44-138-12-2013 has submitted that, subject to cls. (2), (3) and (4), a citizen's right to assemble peaceably and without arms is enshrined in art. 10(1)(b) of our Federal Constitution. And *vide* cl. (2)(b), restrictions of such right can only be that which is deemed "necessary or expedient in the interests of the security of the Federation or any part thereof or public order".

Recent Decisions And Development Of The Law

[17] At the close of hearing of the three applications on 30 March 2014, the court had initially reserved judgment to a date to be fixed. However the case of *Nik Nazmi Nik Ahmad v. PP* [2014] 4 CLJ 944 was decided by the Court of Appeal on 25 April 2014 where the Court of Appeal, in dealing with the main issue of the 'reasonableness' of the restrictions imposed on the fundamental right to peaceful assembly, found s. 9(5) of the PAA to be null and void. The Court of Appeal had proceeded to set aside the charge against Nik Nazmi and to acquit and discharge him.

[18] Had this court delivered its decision at the time immediately following the Court of Appeal's decision in *Nik Nazmi* (*supra*), the court would also have acquitted and discharged the applicants since at that material time, *Nik Nazmi* was a decision of the Court of Appeal. Following the doctrine of *stare decisis*, this court would be bound to follow that decision.

[19] However, the learned Deputy Public Prosecutor had applied for a stay of the decision in this case pending an appeal to the Court of Appeal of another case which also addressed the issue of the constitutionality of s. 9(5) of the PAA. The court had allowed the application for a stay of the decision as it was not objected by any of the parties. Further, the court was also of the considered view that in a matter as serious as the constitutionality of a provision of a law, wisdom dictates that the court should move slowly but carefully.

[20] On 1 October 2015, the Court of Appeal in *PP v. Yuneswaran Ramaraj* [2015] 9 CLJ 873 had departed from the decision in *Nik Nazmi v. PP* (*supra*) and held that s. 9(5) of the PAA to be constitutional, valid and enforceable.

[21] In light of these two Court of Appeal's decisions, the initial submissions of the parties in this case would assume a somewhat lesser importance.

[22] With these developments, the court is faced with two conflicting decisions of the Court of Appeal, one which says that s. 9(5) of the PAA is null and void and the other which states that s. 9(5) of the PAA is constitutional, valid and enforceable. What is the court to do in such circumstances?

[23] Whilst the learned Deputy had urged the court to follow the latest decision of the Court of Appeal, learned counsel for the applicants in 44-138-12-2013 had submitted that in such a situation, the court is free to choose which of the two conflicting decisions to follow, irrespective of the dates of the decisions. Learned counsel had relied on the Court of Appeal case of *Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors* [2005] 3 CLJ 539; [2005] 6 MLJ 120 where Gopal Sri Ram JCA had followed the case of *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718; [1946] AC 163 where it was held that where there are conflicting decisions of the Court of Appeal, the High Court is free to choose which of the decisions to follow.

[24] Further in the Federal Court case of *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1, His Lordship Peh Swee Chin FCJ had held as follows at p. 660 (CLJ); p. 12 (MLJ):

> The doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.
>
> The said exceptions are as decided in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718. The part of the decision in *Young v. Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956 *vide* its s. 3.

[25] The three exceptions to the general rule as set out in the case of *Young v. Bristol Aeroplane* are as follows:

(i) a decision of the Court of Appeal given *per incuriam* need not be followed;

(ii) when faced with a conflict of past decisions of the Court of Appeal, or a court of coordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one; and

(iii) it ought not to follow its own previous decisions when it is expressly, or by necessary implication, overruled by the House of Lords.

[26] As such, learned counsel for the applicants in 44-138-12-2013 had submitted that in this case, the High Court is at liberty to prefer the Court of Appeal's judgment in *Nik Nazmi Nik Ahmad v. PP* over the later Court of Appeal decision's in *PP v. Yuneswaran Ramaraj* if the court was so minded to do.

[27] Another point that was raised by learned counsel for the applicants is that there were three separate concurring judgments in the case of *Nik Nazmi* as compared with only a single concurring judgment in *Yuneswaran*. Learned counsel had submitted that three separate and well-reasoned judgments are stronger than a single concurring judgment.

[28] In their additional submissions, learned counsel for the applicants Muhammad Safwan bin Anang, Ehsan Bukharee bin Badarul Hisham, Adam Adli bin Abdul Halim and Muhamed Bukhary bin Mohamed Sofian in 44-139-12-2013 had submitted along the same lines as learned counsel for Mohd Rafizi and Mohd Adib and the court does not intend to repeat their submissions.

The Court's Findings

[29] The case of *Public Prosecutor v. Yuneswaran Ramaraj* (*supra*) is concerned with the interpretation of s. 9(5) of the PAA. In that case, the respondent, as the executive secretary of PKR, was charged as organiser of an assembly with failing to inform the OCPD Johor Bahru Selatan of the gathering ten days before the date the assembly was to be held. At the hearing before the Sessions Court, the learned Hakim Mahkamah Sesyen ("HMS") found that the role played by the respondent in filling and signing the notification, announcing the upcoming assembly using his Twitter feed and Facebook page so as to invite members of the public to the assembly fell squarely within the definition of "organiser" as defined in s. 3 of the PAA. The HMS found that the respondent was the organiser and that the respondent had failed to cast any reasonable doubt as to the truth of the prosecution's case. He found that the prosecution had proved its case against the respondent beyond all reasonable doubt and as such had found the respondent guilty and had convicted him on the charge. The respondent was sentenced to a fine of RM6,000 and in default to three months imprisonment.

[30] Being dissatisfied with the decision of the Sessions Court, the respondent had filed an appeal to the High Court against his conviction and sentence.

[31] After the appeal was heard, the High Court had reserved its decision. In the meantime, the Court of Appeal had delivered its decision in *Nik Nazmi Nik Ahmad v. PP* (*supra*). It is noted that the Court of Appeal in *Nik Nazmi* had dealt with the exact same provisions of the law and had declared s. 9(5) of the PAA unconstitutional. Although the High Court Judge had found on the facts that the case against the respondent was made out beyond reasonable

doubt, however the learned judge held that he was bound by the decision of the Court of Appeal in *Nik Nazmi* which held that s. 9(5) of the PAA was unconstitutional. On that ground alone, the High Court Judge allowed the respondent's appeal, set aside the decision of the HMS and ordered the RM6,000 fine paid to be refunded.

[32] In coming to its decision on the appeal, the Court of Appeal had considered the object and reasons as well as the legislative history of the statute. The Court of Appeal had scrutinised the PAA carefully and found that the purpose of the PAA was to facilitate the exercise of a right granted by art. 10(1) of the Federal Constitution and not to restrict it. The Court of Appeal found that the PAA is procedural in nature because nothing therein affects the substantive right to assemble peacefully.

[33] On the issue of whether art. 10(2) of the Federal Constitution authorises the imposition of a criminal sanction for failure to give a ten day notice, the Court of Appeal in *Yuneswaran* had found that there is nothing in art. 10(2) that could be construed as prohibiting the imposition of criminal sanctions for non-compliance with the ten day notice. The Court of Appeal was unable to agree with the contention of learned counsel for the respondent that the power to impose criminal sanctions must be expressly provided in art. 10 of the Federal Constitution. The correct approach, it said, was to look at the legislative competency of Parliament under art. 74 which clothes Parliament with power to legislate internal security, which includes public order.

[34] Learned counsel for the respondent in *Yuneswaran* had argued that the criminalisation of the restrictions that limit the right under art. 10(1)(b) was not reasonable and was therefore unconstitutional. Reliance was placed on the case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333 where the Federal Court said that the word "reasonable" should be read into art. 10(2)(c) to qualify the width of the proviso.

[35] The Court of Appeal in *Yuneswaran* had found that the reading of "reasonable" into the word "restrictions" was misplaced and said that it was not persuaded that the word "reasonable" should be read into art. 10(1)(b) of the Federal Constitution. In the final analysis, the Court of Appeal in *Yuneswaran* found as follows:

(i) the requirement under s. 9(1) of the PAA to give notice prior to the exercise of the right to assemble peaceably is not a "restriction" within the meaning of art. 10(2)(b) of the Federal Constitution; and

(ii) the imposition of criminal sanctions under s. 9(5) of the PAA for breach of requirement to give notice is not *ultra vires* art. 10(2)(b) of the Federal Constitution.

[36] In their additional submissions filed on 22 February 2016, the respondent had brought to the attention of the court the case of *PP v. Azmi Sharom* [2015] 8 CLJ 921 where the Federal Court had agreed that the decision in *Sivarasa Rasiah* (*supra*) on the "reasonableness" test was to be departed from. The Federal Court went back into the legislative history of art. 10(2) and said that although the word "restriction" was qualified by the word "reasonable" in the initial draft, however it was omitted from the final draft by the working committee based on the dissenting opinion of one of the members of the Reid Commission.

[37] The Federal Court in *Azmi Sharom* (*supra*) had stated as follows at para. 37:

> For those reasons, we are inclined to agree with the view of the Supreme Court in *Pung Chen Choon*, that it is not for the Court to determine whether the restriction imposed by the Legislature pursuant to art. 10(2) is reasonable or otherwise. That, in our opinion, is a matter strictly within the discretion of the Legislature and not within the purview of the court. Similarly, we are of the view that the reasoning in *Ooi Ah Phua v. Officer in Charge Criminal Investigation Kedah/Perlis* [1975] 1 LNS 117; [1975] 2 MLJ 198 does not justify the insertion of the word "reasonable" before the word "restriction" in art. 10 (2).

[38] In light of the recent developments in the law in the form of both Court of Appeal's as well as Federal Court's decisions as discussed above, the court has chosen to follow the later decision of the Court of Appeal in *Yuneswaran* which found that s. 9(1) of the PAA to give notice prior to the exercise of the right to assemble peaceably is not a "restriction" within the meaning of art. 10(2)(b) of the Federal Constitution and the imposition of criminal sanctions under s. 9(5) of the PAA for breach of requirement to give notice is not *ultra vires* art. 10(2)(b) of the Federal Constitution. The court also finds that the prohibition against assembling at the list of prohibited places listed in the First Schedule to be but a form of restriction on the right to peaceful assembly.

[39] In line with the decision of the Court of Appeal in *Yuneswaran* and the Federal Court in *Azmi Sharom*, the court finds that there is no issue as to the constitutionality of ss. 4(2)(b), 4(3), 9(1), 9(5), 10(c) and 15(3) of the Peaceful Assembly Act 2012. Accordingly, the court would dismiss the applications in 44-138-12-2013, 44-139-12-2013 and 44-32-03-2014. The applicants are herewith ordered to present themselves forthwith before the respective Sessions Courts where further directions would be given for their cases to be heard or continued.